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May 01 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

DERRICK MILLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000470

REPLY BRIEF OF PETITIONER

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ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

CONCLUSION.....5

TABLE OF AUTHORITIES

Cases

| | |
|--|------|
| <u>Alexander v. State</u> , 303 S.C. 539, 402 S.E.2d 484 (1991)..... | 4 |
| <u>Freeman v. McBee</u> , 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984) | 4 |
| <u>Hill v. Lockhart</u> , 474 U.S. 52 (1985) | 3, 4 |
| <u>Jackson v. State</u> , 342 S.C. 95, 535 S.E.2d 926 (2000)..... | 4 |
| <u>McKnight v. State</u> , 320 S.C. 356, 465 S.E.2d 352 (1995)..... | 2 |
| <u>Smith v. State</u> , 369 S.C. 135, 631 S.E.2d 260 (2006)..... | 4 |
| <u>State v. Quattlebaum</u> , 338 S.C. 441, 527 S.E.2d 105 (2000)..... | 3 |
| <u>Strickland v. Washington</u> , 466 U.S. 668 (1984)..... | 2, 3 |
| <u>U.S. v. Cronic</u> , 466 U.S. 648 (1984)..... | 2, 3 |
| <u>Wise v. Wise</u> , 394 S.C. 591, 716 S.E.2d. 117 (Ct. App. 2011) | 4 |

Rules

| | |
|--|---|
| SCACR, Rules of Prof. Conduct, Rule 1.4..... | 1 |
|--|---|

ARGUMENT IN REPLY

Respondent argues that Petitioner had numerous opportunities to ask to speak with his lawyer but never did, thus there is no deficiency. This argument wholly misses the mark. First, at the time of Petitioner's plea there was an order in place from our Supreme Court *requiring* that a plea court *ensure* that a defendant *who is not physically present with his counsel* has a private, direct line of communication with his counsel. The Operation of the Trial Courts During the Coronavirus Emergency order was issued on April 3, 2020, and had been in effect for nine months at the time of Petitioner's plea. Yet Counsel MacDonald testified at the PCR hearing that he was not even sure that the plea court had a duty to ensure a line of communication, App. 77, ll. 2-21, showing an utter lack of knowledge about the scope and content of an order from our highest Court that directly impacted the representation of criminal defendants in South Carolina.

Second, the duty to ensure communication between a client and lawyer rests on the lawyer, as made clear by the South Carolina Rules of Professional Conduct. Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.4. The editor's comment to the rule regarding communication notably states that "[r]easonable communication between the lawyer and the client is *necessary for the client effectively to participate in the representation.*" Further, the uncontradicted testimony in the record was that the guards informed Petitioner he could not speak while others were speaking and he had to be quiet. App. 54, ll. 11-22. The onus is not on the incarcerated individual to ensure that the plea court and his lawyer comply with the Supreme Court orders in place to protect his constitutionally protected rights during an unprecedented global pandemic.

Finally, Respondent asserts that the record shows Petitioner was not confused. This point is directly refuted by the record. Petitioner testified that he was very confused during the plea hearing because he had discussed the plea offer with Counsel MacDonald the day before the

hearing and he had accepted the recommendation for a ten-year offer. As Counsel MacDonald testified, the offers available to Petitioner were for a *negotiated* ten-year sentence or a *recommended ten-to-fifteen-year* sentence. App. 78, ll. 5-11. Neither party testified that the recommendation was for a twenty-year split sentence, which is what the State presented to the plea court. The record supports the finding that Petitioner was confused about the sentencing range.

Defense counsel was deficient in his lack knowledge and understanding of our Supreme Court's order. He was deficient in failing to ensure the order was followed by establishing a private line of communication with Petitioner for the duration of the plea. Petitioner's testimony that he was confused about the plea recommendation range is supported by the record. Petitioner has met the first prong of the Strickland¹ test.

Respondent avers that Petitioner failed to credibly show he would have proceeded to trial but for counsel's error, and therefore has not shown prejudice. Prejudice is presumed in this matter because Petitioner did not have meaningful access to his lawyer during a critical stage of the proceedings against him. See McKnight v. State, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995) ("Courts have interpreted this language to mean prejudice will be presumed if counsel is denied at a critical stage ... "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

In U.S. v. Cronin, 466 U.S. 648, 659 (1984), the United States Supreme Court set forth the three situations in which "the circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." First is "the denial of counsel at a critical stage of the case," second is "counsel's complete failure to subject the government's

¹ Strickland v. Washington, 466 U.S. 668 (1984)

case to meaningful adversarial testing,” and third is “although counsel is available, the circumstances of the [proceeding] would render even a competent lawyer so unlikely to provide effective assistance to the client that no inquiry into prejudice is warranted.” Id.

In the matter *sub judice*, Petitioner was physically separated from his lawyer due to the global pandemic. Our Supreme Court, recognizing the potential problems that could arise in a virtual courtroom setting where counsel and client are not physically together, set forth specific directives to ensure that a criminal defendant’s Sixth Amendment right to counsel was protected. That order required a private line of communication between a defendant and his lawyer to ensure “the protection of free and open communication between client and counsel” that is essential to the Sixth Amendment right to counsel. State v. Quattlebaum, 338 S.C. 441, 446, 527 S.E.2d 105, 107–08 (2000). Petitioner was denied access to his lawyer during the plea proceeding, an inherently critical stage of any case, due not only to the pandemic, but to the failure of counsel and the plea court to follow our Supreme Court order. Prejudice in this matter should be presumed.

However, even if prejudice was not presumed, Petitioner has still met the burden under Strickland, *supra*, and Hill.² Counsel MacDonald testified twice that there were times throughout the representation where Petitioner was insistent on wanting to go to trial but that he would “flip-flop.” App. 83, l. 21-Ap. 84, l.3; App. 86, ll. 14-21. He also testified that he discussed the potential self-defense/stand your ground defense with Petitioner. App. 82, l. 20-App. 83, l. 20. Petitioner testified,

I wanted to go to trial, but during the time of COVID there was no trials. So, there wasn't anything going on. No preliminaries, no trials, no nothing. And the only thing that was available at that point in time was the video conference

² Hill v. Lockhart, 474 U.S. 52, 56 (1985)

thing. And so, they did some, pleas, where they were doing those. App. 60, ll. 13-18.

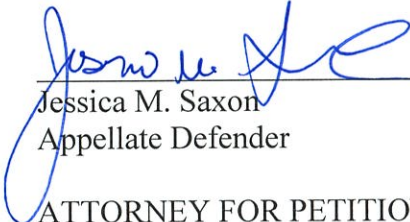
He continued that he had been incarcerated for fourteen months at the time of his plea and he did not see himself receiving a trial in a timely manner. Prior to his plea, Petitioner had only been to court on a bond motion which was ultimately denied.³ While trying to learn what happened with his bond motion, he was informed that the “courts were closed, we’re not – it’s gonna be a while.” App. 60, l. 19-App. 61, l. 15. Further, Petitioner testified that had Counsel MacDonald effectively represented him, Petitioner would have gone to trial instead of pleading guilty because he believed he would prevail. App. 67, ll. 3-13. Our South Carolina Supreme Court has held that a “defendant’s undisputed testimony that he would not have pled guilty but for trial counsel’s advice is sufficient to prove that defendant would not have pled guilty.” Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)). Petitioner has shown actual prejudice.

Petitioner was not able to effectively and privately communicate with his lawyer, in direct contravention of our Supreme Court’s order regarding the operation of court during the COVID pandemic. This was due to Counsel Macdonald’s lack of knowledge of the order and his failure to ensure that the order was enforced during Petitioner’s plea. This amounted to a denial of the right to counsel. Petitioner has met his burden under Strickland and Hill, *supra*. This Court should reverse the order of the PCR court.

³ <https://publicindex.sccourts.org/Spartanburg/PublicIndex/PISearch.aspx> (Search case no: 2019A2320501353) *See Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d. 117, 122 (Ct. App. 2011) (noting an appellate court can take judicial notice of a fact that was not before the lower court if the fact is indisputable); Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984) (stating a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records).

CONCLUSION

Based on the foregoing argument, as well as the argument in the Brief of Petitioner, Petitioner respectfully requests this Court reverse the order of the PCR court and grant him a new trial.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of May, 2025.

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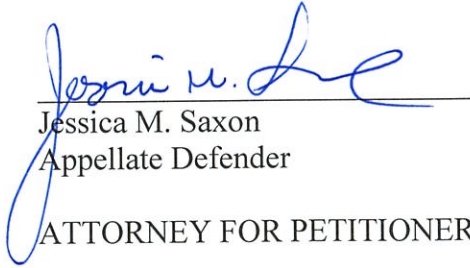
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000470

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Reply Brief of Petitioner in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), and on Derrick Martino Miller, #384656, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 1st day of May, 2025.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

Leverett, Scott

From: Leverett, Scott
Sent: Thursday, May 1, 2025 4:11 PM
To: Josh Edwards
Cc: Susan Spencer; Saxon, Jessica
Subject: 2023-000470 - Derrick Miller v. State - Reply Brief of Petitioner
Attachments: 2023-000470 - Derrick Miller v. State - Reply Brief of Petitioner.pdf

Dear Mr. Edwards,

Attached please find a copy of the Reply Brief of Petitioner in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Jessica Saxon
Appellate Defense